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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1977

NO. 77-146

NEKOOSA PAPERS, INC. ..... *Petitioner*

VS.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INTERVENOR, AND

LINDA JOHNSON AND THE UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, Plaintiffs ..... *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TREVATHAN PRINTING COMPANY, NEWPORT, ARKANSAS

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Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on June 2, 1977, petition for rehearing denied on June 24, 1977.

OPINIONS BELOW

The Opinion of the Court of Appeals dated June 2, 1977, is reported at 15 FEP cases 1658 and is reprinted in the Appendix "A" hereto. On June 24, 1977, Nekoosa's petition for rehearing en banc was denied as set forth in Appendix "B" hereto. The Order of the District Court dated June 8, 1976, was not reported but is printed in Appendix "C" hereto. The issues presented for review by the United States Court of Appeals were certified by order of the District Court dated August 31, 1976 and are set forth in Appendix "D" hereto.

JURISDICTION

The Judgement of the Court of Appeals was entered on June 2, 1977. This Court has jurisdiction to review the judgement by Writ of Certiorari under 28 USC §1254(1).

THE QUESTIONS PRESENTED

(1) Where private parties have pursuant to a "right to sue letter" filed a Title VII action, may the EEOC at some later date, either before or after the private action is concluded, file a separate Title VII action covering matters not included in the private action, or is the EEOC relegated to permissive intervention in the pending private action?

(2) Where the EEOC has failed and refused to attempt conciliation prior to a private Title VII action being filed, may the EEOC be permitted to intervene in the private action, and, after a stay of the action for sixty days to permit the EEOC to attempt conciliation, expand the scope of the action beyond the matters which the private parties are permitted to pursue?

STATUTES, REGULATIONS AND RULES INVOLVED

The statutes involved are Title VII of the Civil Rights Act of 1964 (amended 1972), Section 706(b), 42 USC §2000e-5(b) and §706(f)(1), 42 USC §2000e-5 (f)(1), set forth in Appendix "E" hereto. The regulations involved are the Equal Employment Opportunity Commission Regulations 29 CFR §1601.19b, §1601.22; §1601.23; §1601.25(a) and §1601.25b set forth in Appendix "F". The Rules involved are the Federal Rules of Civil Procedure, Rule 24(b), and Rule 42(a) set forth in Appendix "G" and Appendix "H" hereto.

STATEMENT OF THE CASE

On November 29, 1973, a charge of discrimination was filed with the Equal Employment Opportunity Commission by Plaintiffs Linda Johnson and United Paperworkers International Union, acting through their attorney, against Defendant Nekoosa Papers, Inc. in which the sole allegations of unlawful discrimination were as follows:

> "Female employees have been denied job opportunities, wages and fringe benefits because of their sex, including but not limited to the treatment of maternity conditions by the employer."

On July 19, 1974, the EEOC concluded its investigation and made the following finding in District Director's letter of determination:

> "Having examined the entire record, I conclude that there is reasonable cause to believe that Title VII of the Civil Rights Act of 1964, as amended, has been violated in the manner alleged."

The District Director's letter of July 19, 1974, further stated that "I now invite the parties to join with the Commission in a collective effort toward joint resolution of the matter and to eliminate unlawful employment practices" and that a representative of the Commission would contact each party in the near future to begin conciliation. When Nekoosa had heard nothing from the EEOC by August 7, 1974, it had its attorney write the EEOC and request an immediate conciliation meeting either at New Orleans or at Ashdown. A telephone call from the EEOC representative on August 12, 1974, to Nekoosa's attorney revealed that the EEOC did not have the files on this case and could not then discuss the case. Nekoosa's attorney confirmed this conversation by letter dated August 12, 1974, in which he stated that it was his understanding that the EEOC would review the files as soon as it received the files and get back in touch with Nekoosa's attorney regarding the request for an early meeting on conciliation.

No further contact was made by the EEOC with Nekoosa regarding conciliation. On August 19, 1974, the EEOC issued a right-to-sue letter to the Plaintiffs, and on September 9, 1974, Plaintiffs filed the subject action against Nekoosa alleging that it was a "class action to enjoin and redress sex discrimination in employment . . . on behalf of Linda Johnson and, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of a class of persons composed of all of defendant's women employees, former women employees, and women applicants for employment, who have been denied, assigned to or refused transfer or assignment to any job, and who have been denied equal pay at the Ashdown, Arkansas, operation of the employer because of their sex."

On December 23, 1974, the EEOC filed a motion for permission to intervene, and this motion was granted on February 13, 1975, over the objection of Nekoosa. On February 26, 1975, at the conclusion of a hearing on a number of motions, the District Court made the following ruling from the bench:

> ". . . I will make this as a temporary order to proceed as a class action and identify the class as all female employees as to treatment, including maternity leave and work progression, and require the plaintiff within seven days from this date to notify each female employee of Nekoosa-Edwards that if they are to opt out or opt in to respond so the Court will have the benefit of their result by April 1st. . ."

Nekoosa objected to the form of the notice mailed to employees by the Plaintiffs on March 6, 1975, and on March 11, 1975, the Court, at Nekoosa's request, entered an order directing that another notice be mailed to all females by the Clerk of the Court at Nekoosa's expense. The Plaintiffs' "Notice of Pendency of Class Action," and the Clerk's "Notice of Pendency of Class Action" were each mailed to all thirty-nine (39) of the female employees of Nekoosa. A total of thirty-one (31) of the thirty-nine (39) female employees of Nekoosa opted out of the tentative class suit by mailing to the Clerk a request to this effect. Plaintiff Linda Johnson and four other female employees of Nekoosa opted in the tentative class action by mailing a notice to the Clerk to this effect, and three female employees failed to respond.

On June 8, 1976, the District Court entered an order, which, among other things, (1) denied the class action, (2) permitted each female employee the opportunity to inter-

vene in the action, (3) limited the scope of the action to the allegations in the charge drawn and filed by Plaintiffs' attorney, and (4) directed that the EEOC could not expand the action beyond that which the Plaintiffs were permitted to pursue. (See Appendix "C") Following this, the Court permitted the Plaintiffs' attorney to enter the appearance of seventeen female employees as named Plaintiffs.

On July 2, 1976, the EEOC moved that the District Court amend its order to permit appeal pursuant to 28 USC §1292(b) on the issue of whether the court had properly limited the scope of the EEOC's action to that which the private Plaintiffs could pursue, and Nekoosa requested that the issues be framed to show that the Court had so limited the EEOC because of its failure and refusal to attempt conciliation in violation of the provisions of Title VII and the EEOC's own regulations. The issues certified for appeal by the District Court are set forth in Appendix "D" and in the Opinion of the Court of Appeals, Appendix "A".

REASON FOR GRANTING THE WRIT

I. Conflict With Decision of Other Courts of Appeal.

In *EEOC v. Missouri Pacific R. Co.*, 493 F. 2d 71, 7 FEP cases 177, (CA 8, 1974), the Eighth Circuit held "that once the charging party has filed suit pursuant to a 'right-to-sue' notice, the Commission is relegated to its right of permissive intervention." In the case here presented, the Court of Appeals noted that in order to resolve the questions related to the permissible scope of the EEOC's suit in intervention, the Court was faced with the task of reconciling its holding in *Missouri Pacific* with "the EEOC's general obligation to conciliate." While noting that the Third, Fifth and Sixth Circuits had disagreed with its

holding in *Missouri Pacific* and had allowed the EEOC to file a suit where the EEOC suit would be broader in scope than the private action even though a private suit based upon the same EEOC charge had already been filed,[1] the Eighth Circuit cited a holding by the Tenth Circuit and *dicta* by the Ninth Circuit and reaffirmed its holding in *Missouri Pacific*.[2]

The decision of the Eighth Circuit in *EEOC v. Missouri Pacific R. Co., supra,* is clearly in conflict with the decision of the Third Circuit in *EEOC v. North Hills Passavant Hospital, supra,* the decision of the Sixth Circuit in *EEOC v. Kimberly-Clark Corp., supra,* and with the decision of the Fifth Circuit in *EEOC v. Huttig Sash and Door Company, supra.* Petitioner contends that the holding of the Eighth Circuit in *Missouri Pacific* is an incorrect interpretation of §706(f)(1), 42 USC §2000e-5(f)(1), and the legislative history of Title VII. As stated by the Third Circuit in *EEOC v. North Hills Passavant Hospital,* 13 FEP cases 1129, 1135, the plain words of the statute provide that the EEOC may bring a civil action against a non-governmental respondent and do not provide that the EEOC looses that power when a private party brings a suit based on the same charge. Any

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[1] In **EEOC v. North Hills Passavant Hospital,** 544 F. 2d 664, 672, 13 FEP cases 1129, 1135 (CA 3, 1976); **EEOC v. Kimberly-Clark Corp.,** 511 F. 2d 1352, 10 FEP cases 38 (CA 6, 1975), cert. denied, 423 U.S. 994, 11 FEP cases 930 (1975); and in **EEOC v. Huttig Sash and Door Co.,** 511 F. 2d 453, 10 FEP cases 529 (CA 5, 1975) the Third, Fifth and Sixth Circuits held that the EEOC could file a suit where the EEOC suit would be broader in scope than the private action even though a private suit based upon the same EEOC charge had already been filed.

[2] In **EEOC v. Continental Oil Company,** 54 F. 2d 884, 889-890, 14 FEP cases 365, 369 (CA 10, 1977) and in **EEOC v. Occidental Life,** 535 F. 2d 533, 536, 12 FEP cases 1300, 1302 (CA 9, 1976) (dicta) cert. granted 45 LW 3431 (1976) the Courts of Appeal followed the reasoning of the Eighth Circuit in **Missouri Pacific.**

concern which the Eighth Circuit might have had that the EEOC might be barred by the provisions of Title VII or some statute of limitations from bringing a Title VII action after a private party has proceeded with such an action was cleared up by the United States Supreme Court in its decision of June 20, 1977, in *Occidental Life Insurance Company v. EEOC.*, —— U.S. ——, 14 FEP cases 1718. The Supreme Court there held that the EEOC was not required to bring an action within 180 days of the filing of the charge and that no state or federal statute of limitations had any application.

The conflict in the Circuits on the first issue here presented is in urgent need of final determination. In the Eighth and Tenth Circuits, and perhaps in the Ninth Circuit, the EEOC is relegated to permissive intervention once a private party has filed a Title VII action pursuant to a "right-to-sue" letter. This interpretation means:

(1) that the EEOC is barred from further pursuit of matters included in its determination on a discrimination charge which the EEOC has investigated unless the EEOC makes timely application for intervention, meets the other requirements of Rule 24(b) of the Federal Rules of Civil Procedure, and convinces the district court that intervention is appropriate, and

(2) that, as the Eighth Circuit has held in this case, the EEOC may ignore, with impunity, the mandatory requirements for conciliation, and proceed by way of intervention in a private action to litigate (a) issues broader than those issues permitted by the private litigants, (b) issues never brought out in the EEOC's determination, and (c) issues never made the subject

of mandatory conciliation efforts by the EEOC with the employer.

These problems caused by the Eighth Circuit's holding in *Missouri Pacific* can be avoided by the U. S. Supreme Court following the holdings of the Third, Fifth and Sixth Circuits to the effect that the EEOC is not relegated to permissive intervention after a private party has brought a Title VII suit pursuant to a "right-to-sue" letter. As stated by the Third Circuit in *EEOC v. North Hills Passavant Hospital*, 13 FEP cases 1120, 1135:

> "Any burden arising from the fact that Pope's lawsuit is also pending against the same defendant can be resolved in proceedings under Fed. R. Civ. P. 42(a)."

II. Important Questions Of Federal Law Which Have Not, But Should Be Settled By This Court.

In the case here presented, the Eighth Circuit held that while the conciliation is mandatory prior to direct suit by the EEOC, §706(f)(1) of Title VII, 42 USC §2000e-5(f)(1); 29 CFR §1601.23; *Patterson v. American Tobacco Co.*, 535 F. 2d 257, 12 FEP cases 314 (CA 4, 1976), cert. denied 45 LW 3330, 13 FEP cases 1808 (1976); *EEOC v. Hickey-Mitchell Co.*, 507 F. 2d 944, 8 FEP cases 1281 (CA 8, 1974), it is not mandatory that conciliation be attempted prior to intervention by the EEOC. For this proposition the Court of Appeals cited §706(f)(1) of Title VII, 42 USC §2000e-5(f)(1), and three U. S. district court cases in which the EEOC was permitted to intervene even though the EEOC had not prior to intervention attempted to conciliate. However, the Eighth Circuit correctly pointed out that in each of the district court cases involving this issue, the EEOC has not been permitted to expand the scope of the action

beyond that permitted by the private parties because of the EEOC's failure to attempt conciliation prior to intervention.[3]

The Petitioner contends that if the subject decision of the Eighth Circuit is allowed to stand, the EEOC may hereafter with impunity, ignore the mandatory statutory requirements that it attempt settlement by conciliation prior to involving an employer in expensive and time consuming litigation in the federal courts. The district court cases in which this matter has been considered recognize the effect of allowing the EEOC to violate the very law which it is charged with enforcing.

In *Jones v. Holy Cross Hospital, supra,* the district court not only refers to the mandatory provisions of Section 706 (b) requiring that the EEOC attempt conciliation, but points out that subsection 706(f)(1) which allows the EEOC to intervene in a private suit is the same subsection that provides that the EEOC may not bring an action itself unless it has (1) investigated the charge, (2) determined that there is reasonable cause to believe that the charge is true, and (3) been unable to secure from the employer an acceptable conciliation agreement. The district court there held that the EEOC must not be allowed to use the right of intervention as "a device for circumventing the prerequisites to the institution of an action by the EEOC itself which have been included in the same section of the statute which gives it the right to intervene."

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[3]The only reported cases in which the EEOC has been permitted to intervene in a private suit without having first followed the mandatory attempts at conciliation are: **Willis v. Allied Maintenance Corp.,** 13 FEP cases 767 (SD NY, 1976); **NOW v. Minnesota Mining and manufacturing,** 11 FEP cases 720 (D. Minn. 1975); **NOW, St. Paul Chapter v. 3M Co.,** 14 FEP cases 1052 (D. Minn. -977); **Jones v. Holy Cross Hospital, Silver Springs, Inc.,** 64 FRD 586, 8 FEP cases 1024 (D. Md. 1974). In each of these cases the district court has directed that the EEOC will not be permitted to expand the scope of the action beyond that permitted by the private parties.

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In *NOW, St. Paul Chapter v. 3M Co.,* 14 FEP cases 1052, 1055 (D. Minn. 1977) the district court stated that had the EEOC been unsuccessful in conciliation attempts, it could have enlarged the scope of the litigation beyond that permitted by the private parties, but then went on to hold:

> "The present case, however, is not an appropriate one for allowing the EEOC to enlarge the scope of the action. If the EEOC had investigated the charges of discrimination against 3M, had determined after investigation that there was reasonable cause to believe that the charges were true and had been unable to secure from 3M an acceptable conciliation agreement, it would be permitted to intervene and to enlarge the scope of the action. See *EEOC v. Kimberly-Clark Corp., supra; EEOC v. Huttig Sash & Door Co., supra; EEOC v. Missouri Pac. R.R., supra; Jones v. Holy Cross Hospital Silver Springs, Inc.,* 64 F.R.D. 586, 8 FEP cases 1024 (D. Md. 1974). Because the EEOC failed to attempt conciliation, it will be limited to intervening and assisting the private plaintiffs. The EEOC wll not be permitted to use the mechanism of intervention to circumvent the statutory prerequisites to the EEOC's institution of its own action. . ."

Whether the U. S. Supreme Court allows the rule of the Eighth Circuit in the *EEOC v. Missouri Pacific R. Co., supra,* to stand or not, the Supreme Court should decide the remaining important questions of federal law here presented. Where the EEOC has failed and refused to attempt mandatory conciliation prior to a private Title VII action being filed, it should be an abuse of discretion under Rule 24(b), FRCP, for the district court to permit the EEOC to intervene, but, if intervention is allowed, the EEOC should

not be permitted, after a stay of the action for sixty days to permit the EEOC to attempt conciliation, to expand the action beyond the scope of the action permitted by the private litigants.

In *EEOC v. Hickey-Mitchell,* 507 F. 2d 944, 8 FEP cases 1281, 1284, the Eighth Circuit upheld the trial court's dismissal of the EEOC's Title VII action against the employer because of the EEOC's failure to follow 29 CFR §1601.23. The Court there said:

> ". . . the Commission offers no acceptable justification for its breach of the regulation in this case, and we cannot conclude that the Employer was not prejudiced by it. The Employer's letter refusing to conciliate is, as we have noted, the event which should have triggered the application of the regulation, not the excuse for ignoring it. Compliance with the regulation, a last gesture by the Commission of a conciliatory attitude, may well give pause to the most (theretofore) recalcitrant employer, now indubitably faced with expensive and time-consuming litigation, and thus lead to a resolution of these disputes in the congressionally preferred forum."

The ruling of the Eighth Circuit in the case here under consideration ignores the wisdom of the Court's decision in *EEOC v. Hickey-Mitchell, suprc.* The effect of the Eighth Circuit's decision in the subject case is to allow the EEOC to make some demand upon Nekoosa, either reasonable or unreasonable, and then to proceed with this "expensive and time consuming litigation" if Nekoosa will not, within 60 days, accept such demand of the EEOC, whether such demand be reasonable or unreasonable. The proper remedy for the EEOC's failure and refusal to abide by the very Act

which it is charged with enforcing and its own regulations is either (1) to affirm the District Court's holding that the EEOC may not expand this action beyond that which the private Plaintiffs may pursue, or (2) to determine that it was an abuse of discretion for the district court to permit the EEOC to intervene in this action.

CONCLUSION

For the reasons set forth above, Petitioner respectfully urges that the Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX "A"

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 76-1686

LINDA JOHNSON AND UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO ..... *Appellants*

vs.

NEKOOSA-EDWARDS PAPER COMPANY ..... *Appellee*

Appeals from the United States District Court for the Western District of Arkansas

No. 76-1819

LINDA JOHNSON AND UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO ..... *Plaintiffs*

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ..... *Plaintiff-Intervenor-Appellant*

vs.

NEKOOSA PAPERS, INC. (Ashdown, Arkansas) ..... *Defendant-Appellee*

Submitted: February 17, 1977
Filed: June 2, 1977

Before CLARK, Associate Justice, Retired,* GIBSON, Chief Judge, and HEANEY, Circuit Judge.

*TOM C. CLARK, Associate Justice, Retired, Supreme Court of the United States, sitting by designation.

HEANEY, Circuit Judge.

This action was filed by Linda Johnson and the United Paperworkers International Union against Nekoosa Papers, Inc., alleging the existence of sex discrimination in its employment practices at Nekoosa's Ashdown, Arkansas, facilities. The named plaintiffs sought to represent a class including all past and present female employees and all female job applicants who were denied employment opportunities because of their sex. The Equal Employment Opportunity Commission (EEOC) was allowed to intervene. The District Court initially certified the class to include only present employees but later decertified the class entirely and ruled that "the EEOC may not expand the scope of this action beyond that which the Plaintiffs are permitted to pursue."[1] The District Court's decision to decertify the class and to limit the scope of the EEOC's intervention is challenged in this consolidated appeal.[2]

Prior to bringing this action, Johnson and the Union had filed a charge with the EEOC alleging that "[f]emale employees have been denied job opportunities, wages and fringe benefits because of their sex, including but not

[1]**Linda Johnson and United Paperworkers International Union, AFL-CIO, and Equal Employment Opportunity Commission v. Nekoosa Papers, Inc. (Ashdown, Arkansas)**, CA No. T-74-57-C (W.D. Ark., order filed June 8, 1976). Thus, the Equal Employment Opportunity Commission (EEOC) would not be able to raise the claims of those who were denied job opportunities because of their sex and to challenge the virtual exclusion of females from production jobs.

[2]The above entitled cases were consolidated by this Court for the purpose of this opinion.

limited to the treatment of maternity conditions by the employer."[3] After an investigation, the EEOC found reasonable cause to believe that Nekoosa discriminated against women in violation of Title VII with respect to maternity benefits, job opportunities and wages. The EEOC issued its determination of probable cause on June 19, 1974, and indicated that an EEOC representative would be in contact with each party in the near future to begin conciliation. In early August, 1974, the attorney for Nekoosa contacted the EEOC by letter and telephone seeking to expedite the conciliation process. The EEOC did not respond to Nekoosa's overtures. The EEOC issued a right-to-sue letter to Johnson and the Union at their request on August 19, 1974. This action was filed on September 9, 1974.

I.

We first consider the threshold question of whether we have jurisdiction to hear an appeal from the order of the District Court denying class certification. Under the circumstances of this case we hold that the order is not appealable and, therefore, dismiss the appeal in No. 76-1686.

As this Court recently noted, "nearly every court which has considered the question has found that a discretionary order refusing to certify a class is not in itself appealable." *In Re Piper Aircraft Distribution System Antitrust Litigation,* No. 76-1360, slip op. at pp. 7-8 (8th Cir., filed March 15, 1977). Appeals have been permitted, however, under 28 U.S.C. §1291 when the denial of class certification as a practical matter sounds the death knell of the action, *Cecil Livesay and Dorothy Livesay, etc. v.*

[3]The charge was filed with the EEOC on November 29, 1973, by Johnson and the Union acting through their attorney.

Punta Gorda Isles, Inc., etc., Nos. 76-1881 and 76-1906, slip op. at p. 5 (8th Cir., filed March 4, 1977); *Eisen v. Carlisle & Jacquelin,* 370 F. 2d 119, 120-121 (2nd Cir. 1966), *cert. denied,* 386 U.S. 1035 (1967); or under the collateral order doctrine when the issue is "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated;" *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949); *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 171-172 (1974); and under 28 U.S.C. §1292(a)(1) when the denial of class certification narrows the scope of injunctive relief available. *Jones v. Diamond,* 519 F. 2d 1090 (5th Cir. 1975).

The death knell doctrine is not applicable in this case because the District Court has permitted the joinder of seventeen individual plaintiffs and has allowed the EEOC to intervene, thus making it likely that the action will proceed even though certification is not granted. Moreover, the action is brought under Title VII which provides attorney fees to the prevailing party. 42 U.S.C. §2000e-5(k). This significantly undercuts the economic rationale for the death knell doctrine. *See Williams v. Mumford,* 511 F. 2d 363, 368 (D.C. Cir.), *cert. denied,* 423 U.S. 828 (1975); *Hackett v. General Host Corporation,* 455 F. 2d 618, 622-623 (3rd Cir.), *cert. denied,* 407 U.S. 925 (1972).

The collateral order exception is not applicable because the order decertifying the class fails to satisfy the tests set forth in *Cohen v. Beneficial Industrial Loan Corp., supra. See also* 9 J. Moore, *Federal Practice* ¶110.10, at 133 (2d ed. 1975). The order denying class certification does not present a separate and collateral issue because whether or not the class should have been certified involved a consideration of the merits of the entire action. *See In*

Re Piper Aircraft Distribution System Antitrust Litigation, supra at slip op. p. 7; *Share v. Air Properties G. Inc.*, 538 F. 2d 279, 284 (9th Cir.), *cert. denied*, 45 U.S.L.W. 330 (1976). Nor is a question of general significance presented here. Instead, the decision of the District Court denying certification of the class depended upon the narrow facts of the case. A final reason that review of class certification is inappropriate under the collateral order exception is that it can usually be examined on appeal from final judgment. *Williams v. Mumford, supra* at 368; *Samuel v. University of Pittsburgh*, 506 F. 2d 355, 360 (3rd Cir. 1974).

Even if we were to extend the injunction exception and allow appeals from orders denying class certification, it would not be applicable here. A number of Circuits have permitted appeals under 28 U.S.C. §1292(a)(1) when the denial of class certification narrows the scope of injunctive relief available if the plaintiff later prevails on the merits. *Jones v. Diamond, supra; Price v. Lucky Stores, Inc.*, 501 F. 2d 1177 (9th Cir. 1974); *Yaffee v. Powers*, 454 F. 2d 1362 (1st Cir. 1972); *Brunson v. Board of Trustees of School Dist. No. 1*, 311 F. 2d 107 (4th Cir. 1962), *cert. denied*, 373 U.S. 933 (1963).[4] The Eighth Circuit has not yet decided whether to extend the injunction exception to

[4]This has been criticized "as an unwarranted expansion of the statutory language" because the denial of class certification does not constitute either the grant or the denial of an injunction. **Williams v. Mumford**, 511 F. 2d 363, 369 (D.C. Cir.), **cert. denied**, 423 U.S. 828 (1975). **See also Weit v. Cont. Ill. Nat. Bank & Trust Co. of Chicago**, 535 F. 2d 1010 (7th Cir. 1976); **City of New York v. International Pipe & Ceramics Corp.**, 410 F. 2d 295 (2nd Cir. 1969). The cases allowing appeals from orders denying class certifications under 28 U.S.C. §129(a)(1) have also been distinguished because those cases "were civil rights cases where the acts of the defendants were of such a nature that the wrong done could not be remedied by an injunction in favor of individual plaintiffs only." **Weit v. Cont. Ill. Nat. Bank & Trust Co. of Chicago, supra** at 1014.

permit appeals from class certification orders, *Donaldson v. Pillsbury Co.*, 529 F. 2d 979, 981 (8th Cir. 1976), nor do we need to reach that issue since only one of the two requirements for its application has been satisfied here. The first requirement is that "the plaintiff's prayer for an injunction must constitute the heart of the relief he seeks." *Jones v. Diamond, supra* at 1095. The second is that "the practical result of the order denying the proposed class must be to deny the requested broad injunction." *Id.* at 1096. It is the latter requirement that is not satisfied here. Because we are permitting the EEOC to intervene upon a broad basis, the class will in effect be represented, *see* Part II, *infra*, and the scope of relief available will be as broad as if the class had been certified.

Since none of the exceptions discussed above apply, the order of the District Court refusing to certify the class is not appealable. Accordingly, the appeal in No. 76-1686 is dismissed for lack of jurisdiction.[5]

[5]In dismissing the appeal for lack of jurisdiction, we express no opinion whether the District Court properly refused to certify the class. **See, e.g., Marceline Donaldson, et al v. The Pillsbury Company, etc.**, No. 76-1288 (8th Cir., filed April 14, 1977), holding that the District Court abused its discretion in denying class status even though an earlier appeal challenging the denial of class status had been dismissed for lack of jurisdiction. **Donaldson v. Pillsbury Co.**, 529 F. 2d 979 (8th Cir. 1976).

In this case, the District Court refused to order discovery with respect to all applicants for employment with Nekoosa. While we do not reach this issue, we note that broad discovery should usually be permitted prior to class certification. **See Yaffe v. Powers**, 454 F. 2d 1362 (1st Cir. 1972).

II.

We next consider whether the District Court properly held that the EEOC may not expand the scope of the action beyond that of the charge filed by the plaintiffs with the EEOC. The District Court certified the following questions to this Court pursuant to 28 U.S.C. §1292(b).[6]

1. Whether the Commission's suit in intervention properly enlarges the scope of the private plaintiff's suit so as to include all forms of discrimination described in the Commission's Determination of Plaintiffs' underlying charges.

2. Whether the Court properly held that "the EEOC may not expand the scope of this action beyond that which the Plaintiffs are permitted to pursue" in view of the fact that the EEOC had not prior to the filing of this Motion to Intervene endeavored "to eliminate any such alleged, unlawful employment practice by informal methods of conference, conciliation, and persuasion" as required by §706 (b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(b) and that the EEOC had not as required by its rules, 29 CFR §1601-23 (1974), notified the Defendant in writing "that such efforts have been unsuccessful and will not be resumed except on the Respondent's written request within the time specified in such notice."

3. Whether the Court abused its discretion in permitting the EEOC to intervene in this action in view of the fact that the EEOC had not, prior to the

[6]The EEOC was granted permission to appeal by this Court in an order dated September 23, 1976.

filing of its Motion for Intervention, endeavored to eliminate any alleged unlawful employment practice by informal methods of conference, conciliation and persuasion as required by §706(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(b) and that the EEOC had not, as required by its own rules, 29 CFR §1601-23 (1974), notified the Defendant, in writing "that such efforts have been unsuccessful and will not be resumed except on the Respondent's written request with the time specified in such notice."

In order to resolve these questions relating to the permissible scope of the EEOC's suit in intervention, we are faced with the task of reconciling our holding in *Equal Employment Op. Com'n v. Missouri Pacific R. Co.*, 493 F. 2d 71 (8th Cir. 1974), with the EEOC's general obligation to conciliate.

In *Missouri Pacific*, this Circuit held "that, once the charging party has filed suit pursuant to a 'right to sue' notice, the Commission is relegated to its right of permissive intervention." *Id.* at 75. The Court relied upon the express statutory scheme,[7] 42 U.S.C. §2000e-5(f)(1),

[7]The scheme of the statute itself * * * negates the Commission's double-barreled approach. Once either the Commission or the charging party has filed suit, §2000e-5(f)(1) speaks only in terms of intervention — the absolute right of the charging party to intervene if the Commission elects to file suit within 180 days; the permissive right of intervention on the part of the Commission in the private action. The statute cannot be read to warrant duplicitous lawsuits when both actions find their genesis in one unlawful employment practice charge.

Equal Employment Op. Com'n v. Missouri Pacific R. Co., 493 F. 2d 71, 74 (8th Cir. 1974).

and the legislative history of the 1972 amendments to Title VII[8] in reaching its conclusion that duplicitous suits were barred by the statute. *Accord, E.E.O.C. v. Continental Oil Co.*, 548 F. 2d 884, 889-890 (10th Cir. 1977); *Equal Employment Opportunity v. Occidental Life*, 535 F. 2d 533, 536 (9th Cir.) (dicta), *cert. granted*, 45 U.S.L.W. 3431 (1976).[9]

A problem arises, however, because different issues may be raised by the private suit and the suit filed by the EEOC even though the same charge originally filed with the EEOC serves as the basis for both suits. In this case, in

[8]H. R. Rep. No. 92-238, 92d Cong., 2d Sess., 1972 U.S. Code Cong. & Admin. News p. 2148.

[9]Other Circuits have, however, developed different approaches to the problem of duplicitous suits. The Fifth and Sixth Circuits allow the EEOC to file suit if the EEOC suit would be broader in scope than the private action, even if a private suit based upon the same EEOC charge has already been filed. **E.E.O.C. v. McLean Trucking Co.**, 525 F. 2d 1007 (6th Cir. 1975); **Equal Employment Op. Com'n v. Kimberly-Clark Corp.**, 511 F. 2d 1352 (6th Cir. 1975), **cert. denied**, 423 U.S. 994 (1976); **Equal Employment Op. Com'n v. Huttig Sash & Door Co.**, 511 F. 2d 453 (5th Cir. 1975). This approach was rejected by the Tenth Circuit because it was unable to find any statutory basis for defining the EEOC's right to sue in terms of the scope of its suit. **E.E.O.C. v. Continental Oil Co.**, 548 F. 2d 884, 889 (10th Cir. 1977).

The Third Circuit reads the statute and the legislative history differently and places no limitation on the right of the EEOC to bring suit after a private action has been filed. **Equal Emp. Opp. Com'n v. North Hills Passavant Hosp.**, 544 F. 2d 664, 672 (3rd Cir. 1976). Any problem with duplicitous suits is to be resolved under Fed. R. Civ. P. 42(a) which provides for the consolidation of actions involving common questions of law and fact. **Id. See generally** Reiter, **The Equal Employment Opportunity Commission and "Duplicitous Suits": An Examination of EEOC v. Missouri Pacific Railroad Co.**, 49 N.Y.U.L. Rev. 1130 (1974).

We adhere to our decision in **Equal Employment Op. Com'n v. Missouri Pacific R. Co.**, 493 F. 2d 71 (8th Cir. 1974), for the reasons stated in that opinion.

its suit in intervention, the EEOC seeks to raise the claims of unsuccessful job applicants and to challenge the apparent exclusion of females from production jobs.[10] Thus, the scope of the EEOC suit is broader than that of the private suit which the District Court has limited to those issues raised by the charge filed with the EEOC which only alleged discrimination against present female employees.[11] The Court in *Missouri Pacific* recognized that the scope of the EEOC suit might be broader than that of the private suit when it stated that it was "fully confident that [the District Court] * * * will permit intervention and enlargement of the scope of the action by the Commission if necessary to the rendering of full and complete justice." *Equal Employment Op. Com'n v. Missouri Pacific R. Co., supra* at 75. My concurring opinion went one step further and would have required the District Court to broaden the scope of the suit to include those issues raised by the EEOC because the EEOC is charged with the responsibility of eliminating discriminatory employment practices, and, thus, must be allowed to bring the broader issues before the court. *Id.* at 75 (J. Heaney concurring). Indeed, it would

[10]The EEOC investigation revealed that only 4.5% of Neoosa's employees were female even though the community work force was 22.4% female. Moreover, 78.5% of the female Nekoosa employees occupied clerical positions.

[11]We emphasize that we are without jurisdiction to review this aspect of the District Court's order. We note, however, that it has been held that a private suit is not necessarily restricted to the scope of the charge filed with the EEOC and may extend to those issues revealed by a reasonable investigation by the EEOC. **See Jenkins v. Blue Cross Mutual Hospital Ins., Inc.**, 522 F. 2d 1235, 1241 (7th Cir. 1975) (en banc); **Danner v. Phillips Petroleum Co.**, 447 F. 2d 159, 161-162 (5th Cir. 1971); **Sanches v. Standard Brands, Inc.**, 431 F. 2d 455, 466 (5th Cir. 1970); **cf. Parham v. Southwestern Bell Telephone Co.**, 433 F. 2d 421, 425 (8th Cir. 1970).

be anomalous if we did not allow the EEOC's suit in intervention to broaden the issues beyond those raised by the charge filed with the EEOC since the EEOC is not so restricted if it brings a direct suit. *See E.E.O.C. v. General Elec. Co.*, 532 F. 2d 359 (4th Cir. 1976); *Equal Employment Op. Com'n v. Huttig Sash & Door Co.*, 511 F. 2d 453 (5th Cir. 1975); *cf. Equal Employment Op. Com'n v. Western Pub. Co., Inc.*, 502 F. 2d 599 (8th Cir. 1974). We cannot, however, simply order that the EEOC be permitted to broaden the scope of its suit in intervention because we must also consider the obligation of the EEOC to attempt conciliation.

Because of the enormous backlog of cases pending before the EEOC, a private party will usually be able to bring an action before the EEOC has attempted conciliation and completed the administrative process.[12] When this

[12]A charging party cannot bring a private action unless permission is received from the EEOC. However, the EEOC is required to issue a right-to-sue letter if it either dismisses a charge or does not bring suit within 180 days of the date the charge was filed. The charging party then has 90 days in which to initiate his own court action. 42 U.S.C. §2000e-5(f)(1). It is, thus, possible for a charging party to bring suit within a short period of time after the charge has been filed.

While the EEOC can bring an action within 30 days after the charge has been filed, it can only do so if it finds reasonable cause to believe the charge to be true and if conciliation has failed. Since it has often taken the EEOC two to three years to attempt conciliation, **Equal Employment Op. Com'n v. Kimberly-Clark Corp., supra** at 1358; U.S. Comm'n on Civil Rights, **The Federal Civil Rights Enforcement Effort — 1974**, 529 (1975), the EEOC will usually be unable to bring its own action before a private action has been filed. The EEOC's delay in processing cases is reflected by its backlog of cases. As of June 30, 1975, over 126,000 cases were pending before the EEOC. As the following table indicates, some of the pending charges date back to 1968.

(continued on next page)

occurs, as it did here, the EEOC is precluded from bringing a direct action and is relegated to its right of permissive intervention. If conciliation was required prior to intervention, the EEOC's motion to intervene might not be considered timely under Fed. R. Civ. P. 24 because the process of conciliation is often time-consuming. While conciliation is mandatory prior to direct suit by the EEOC, 42 U.S.C. §2000e-5(f)(1); 29 C.F.R. §1601.23; *Patterson v. Amercan Tobacco Company*, 535 F. 2d 257 (4th Cir.), *cert. denied*, 45 U.S.L.W. 3330 (1976); *Equal Employment Op. Com'n v. Hickey-Mitchell Co.*, 507 F. 2d 944 (8th Cir. 1974); it is not mandatory under the statutory scheme prior to intervention by the EEOC.[13] 42 U.S.C. §2000e-5(f)(1). Thus, the EEOC

12 continued.

Fiscal Year in Which Charge was Filed	Number of Open Charges
1968	2,213
1969	3,260
1970	4,245
1971	5,917
1972	8,114
1973	18,550
1974	30,812
1975	46,919
Unspecified	6,310
TOTAL	126,340

Report to the Congress by the Comptroller General of the United States, **The Equal Employment Opportunity Commission Has Made Limited Progress in Eliminating Employment Discrimination** 9 (September 28, 1976).

[13]The EEOC has been permitted to intervene in three District Court cases even though it had not attempted to conciliate. **Willis v. Allied Maintenance Corp.**, 13 FEP Cases 767 (S.D. N.Y. 1976); **NOW v. Minnesota Mining & Mfg.**, 11 FEP Cases 720 (D. Minn. 1975); **Jones v. Holy Cross Hospital Silver Springs, Inc.**, 64 F.R.D. 586 (D. Md. 1974). In each case, the EEOC was not permitted to expand the scope of the action because it had not attempted to conciliate. Because we are ordering a stay to permit conciliation, the EEOC will be permitted to expand the scope of its action here.

cannot be precluded from intervention because it failed to conciliate.

Conciliation is nonetheless an integral part of Title VII, *Equal Employment Op. Com'n v. Hickey-Mitchell Co., supra,* and is desirable for a variety of policy reasons including giving the defendant notice and an opportunity to respond to any additional claims revealed by the EEOC investigation and in order to avoid expensive and time-consuming court actions.[14] Because we believe strongly in the value of conciliation, we hold that while the EEOC is not barred from intervention by its failure to attempt to conciliate, it is under a continuing obligation to attempt to conciliation even after it has intervened in the action. To this end, we order the District Court to stay the action for sixty days and to require the EEOC to make a prompt offer to conciliate. If the offer is accepted by Nekoosa and if thereafter EEOC fulfills its obligation to conciliate in good faith and if no settlement is forthcoming by the end of the sixty-day period, the District Court is directed to then enter an order permitting the EEOC to expand its intervention in accordance with its petition. If Nekoosa refuses to conciliate, then the District Court's order permitting the EEOC to expand the scope of its intervention shall be issued forthwith.

[14]We are aware that the conciliation process has to date been relatively unsuccessful. **See** Peck, **The Equal Employment Opportunity Commission: Developments in the Administrative Process 1965-1975,** 51 Wash. L. Rev. 831, 852-853 (1976); Report to Congress by the Comptroller General of the United States, **supra** at 7-37. Action by the legislative and executive branches of the fedral government is apparently necessary to make the process a more effective one.

We believe such a stay is not so long as to unduly prejudice the individual claimants. We realize that requiring the EEOC to expedite its conciliation process after intervention might be difficult for them because of their backlog of cases. We feel, however, it is the best balance between the right of the EEOC to intervene, the obligation of the EEOC to attempt conciliation and the right of the individual claimants to proceed with their action.

Accordingly, we reverse and remand this action to the District Court for action consistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX "B"

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

76-1819
September Term, 1976

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ..... *Appellant*

vs.

NEKOOSA PAPERS, INC. (Ashdown, Arkansas) .... *Appellee*

Appeal from the United States District Court for the Western District of Arkansas

The Court having considered petition for rehearing en banc filed by counsel for appellee and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

June 24, 1977

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

CA NO. T-74-57-C

LINDA JOHNSON AND UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO ..... *Plaintiffs*

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ..... *Intervenor*

vs.

NEKOOSA PAPERS, INC. (Ashdown, Arkansas) ... *Defendant*

ORDER

After considering the oral testimony and exhibits introduced into evidence and the briefs and oral arguments made by counsel for the parties in this case, the Court makes the following order:

(1) That the Motion of the EEOC, in which the Plaintiffs joined, requesting the Court to reconsider its Order of March 6, 1975, in which the Court refused to include applicants for employment in the temporary class is hereby denied;

(2) That a class action may not be maintained because of the failure to meet the prerequisites to a class action as set forth in Rule 23(a) of the Federal Rules of Civil Procedure;

(3) That the female employees of the Defendant who have opted in this suit and any other female employees of the Defendant who care to become plaintiffs in this suit may, at their request within fifteen (15) days of this date, be joined as parties plaintiff in this action, it being understood that even those female employees who have previously opted out of this action may be permitted to become parties plaintiff upon filing a written request to this effect with the clerk of the Court within fifteen days of this date;

(4) That the scope of this action is limited to the matters within the scope of the Plaintiffs' charge that "female employees have been denied job opportunities, wages and fringe benefits because of their sex, including but not limited to the treatment of maternity conditions by the employer";

(5) That the EEOC may not expand the scope of this action beyond that which the Plaintiffs are permitted to pursue;

(6) That the scope of discovery by the parties in this action is limited to the matters which are reasonably calculated to lead to the discovery of admissible evidence in the trial of an action within the scope of Plaintiffs' charge that the Defendant has denied female employees "job opportunities, wages and fringe benefits because of their sex, including but not limited to the treatment of maternity conditions. . . .";

(7) That counsel for all the parties are directed to meet within ten days of this date and attempt to resolve all pending matters regarding discovery; that rulings on Defendant's Motions for Protective Order and EEOC's Motion to Compel Answers to Interrogatories are deferred until after the counsel for the parties have met in an attempt to resolve all disputes involving discovery; and that any unresolved disputes involving discovery will be heard by the Court on the 12th day of July, 1976; and

(8) That except for good cause shown, the parties shall complete all discovery in this case within seventy-five days from this date and be prepared at the end of the seventy-five day period to go to trial on all claims that have not then been resolved, the parties to give the Court notice prior to the end of the seventy-five day period of all unresolved claims.

Dated this 8th day of June, 1976.

/s/ Paul X Williams,
United States District Judge

APPENDIX "D"

STATEMENT OF ISSUES PRESENTED FOR REVIEW

By Order of the District Court dated August 31, 1976, the Court certified the following questions to the Court of Appeals pursuant to 28 USC §1292(b):

(1) Whether the Commission's suit in intervention properly enlarges the scope of the private plaintiffs' suit so as to include all forms of discrimination described in the Commission's Determination of Plaintiffs underlying charges.

(2) Whether the Court properly held that "the EEOC may not expand the scope of this action beyond that which the Plaintiffs are permitted to pursue" in view of the fact that the EEOC had not prior to the filing of its Motion to Intervene endeavored "to eliminate any such alleged, unlawful employment practice by informal methods of conference, conciliation, and persuasion" as required by §706(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(b) and that the EEOC had not as required by its rules, 29 CFR §1601.23 (1974), notified the Defendant in writing "that such efforts have been unsuccessful and will not be resumed except on the Respondent's written request within the time specified in such notice."

(3) Whether the Court abused its discretion in permitting the EEOC to intervene in this action in view of the fact that the EEOC had not, prior to the filing of its Motion for Intervention,

endeavored to eliminate any alleged unlawful employment practice by informal methods of conference, conciliation and persuasion as required by §706(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-(b) and that the EEOC had not, as required by its own rules, 29 CFR §1601.23 (1974), notified the Defendant, in writing "that such efforts have been unsuccessful and will not be resumed except on the Respondent's written request with the time specified in such notice."

APPENDIX "E"

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (AMENDED 1972), SECTION 706(b), 42 U.S.C. §2000e-5(b) AND SECTION 706(f)(1), 42 U.S.C. §2000e-5(f)(1)

§706(b): Whenever a charge is filed by or on behalf of a person claiming to be agrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000.00 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

* * *

§706(f)(1): If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government,

governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

APPENDIX "F"

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REGULATIONS 29 CFR §1601.19b(a); §1601.22; §1601.23; §1601.25(a); §1601.25b

§1601.19b: Determination as to reasonable cause.

(a) If the Commission determines that a charge fails to state a valid claim for relief under Title VII, or that there is not reasonable cause to believe that a charge is true, the Commission shall dismiss the charge. Where, however, it determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, it shall endeavor to eliminate such practice by informal methods of conference, conciliation, and persuasion.

* * *

§1601.22: Conciliation; settlements.

In conciliating a case in which a determination of reasonable cause has been made, the Commission shall attempt to achieve a just resolution and to obtain assurances that the respondent will eliminate the unlawful employment practice action. Disposition of a case pursuant to this section shall be in writing, and notice thereof shall be sent to the parties. Proof of compliance with Title VII will be obtained by the Commission before the case is closed.

§1601.23: Refusal of respondent to cooperate.

Should a respondent fail or refuse to confer with the Commission or its representative, or fail or refuse to make a good faith effort to resolve any dispute, the Commission may terminate its efforts to conciliate the dispute. In such event, the respondent shall be notified promptly, in writing,

that such efforts have been unsuccessful and will not be resumed except upon the respondent's written request within the time specified in such notice.

* * *

§1601.25: Notice to respondent, person filing a charge on behalf of the aggrieved person and aggrieved person.

(a) In any instance in which the Commission is unable to obtain voluntary compliance as provided by Title VII, as amended it shall so notify the respondent, the person filing a charge on behalf of the aggrieved person, the aggrieved person or persons, and any State or local agency to which the charge has been previously deferred pursuant to §1601.12 or §1601.10. Notification to the aggrieved person shall include:

(1) A copy of the charge.

(2) A copy of the Commission's reasonable cause or no reasonable cause determination as appropriate.

(3) Advice concerning his or her rights to proceed in court under Section 706(f)(1) of Title VII.

* * *

§1601.25b: Processing of cases, when notice issues under §1601.25.

(a) The Commission may bring a civil action against any respondent named in a charge, not a government, governmental agency, or political subdivision, after thirty (30) days from the date of the filing of a charge with the Commission unless a conciliation agreement acceptable to the Commission has been secured.

Where the person claiming to be aggrieved is not a party to such an agreement, the agreement shall not extinguish or in any way prejudice such person's right to proceed in court under Section 707(f)(1).

(b) The Commission shall not issue a notice pursuant to §1601.25 prior to a determination under §1601.19d or where reasonable cause has been found, prior to efforts at conciliation with respondent, except as provided in paragraph (c) of this section.

(c) At any time after the expiration of one hundred and eighty (180) days from the date of the filing of a charge or upon dismissal of the charge at any stage of the proceedings an aggrieved person may demand in writing that a notice issue pursuant to §1601.25, and the Commission shall promptly issue a notice, and provide copies thereof and copies of the charge to all parties.

(d) Issuance of notice pursuant to paragraph (c) of this section shall suspend further Commission proceedings unless the Field Director determines that it is in the public interest to continue such proceedings, or unless, within twenty (20) days after receipt of such notice, a party requests the Field Director, in writing, to continue to process the case.

APPENDIX "G"

FEDERAL RULES OF CIVIL PROCEDURE, RULE 24(b)

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

APPENDIX "H"

RULE 42. Consolidated; Separate Trials.

(a) *Consolidation.* When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs of delay.